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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 WILMA J. HARBOURNE,
11 Plaintiff,

Civil No. 07-1839-AA
OPINION AND ORDER

12 vs.

13 MICHAEL J. ASTRUE,
14 Commissioner of Social Security,
15 Defendant.

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17 Attorney At Law
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26 Attorneys for defendant

27 AIKEN, Judge:

28 Claimant, Wilma Harbourne, brings this action pursuant to

1 the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain
2 judicial review of a final decision of the Commissioner denying
3 her application for disability insurance benefits under Title II
4 of the Act. 42 U.S.C. §§ 401-34. Tr. 70-72. For the reasons
5 set forth below, the Commissioner's decision is reversed and
6 remanded for payment of benefits.

7 **PROCEDURAL BACKGROUND**

8 The Commissioner denied plaintiff's application for
9 disability insurance benefits initially and upon reconsideration.
10 In February 2005, an administrative law judge (ALJ) held a
11 hearing and issued a decision in March 2005, finding plaintiff
12 not disabled. Tr. 243-54, 468-96. In August 2005, the Appeals
13 Council vacated the ALJ's decision and remanded the case for a
14 second hearing and development of the record regarding
15 plaintiff's mental impairment. Tr. 263-65. The ALJ subsequently
16 held two additional hearings. At the first hearing, the ALJ
17 heard testimony from plaintiff, represented by counsel; Dr. David
18 Rullman; and a vocational expert. Tr. 497-541. At the second
19 hearing, the ALJ heard testimony from Dr. McDevitt, a
20 psychiatrist. Tr. 542-58. On November 7, 2006, the ALJ issued
21 a decision finding plaintiff not disabled under the Act. Tr. 17-
22 29.

23 In October 2007, the Appeals Council denied plaintiff's
24 request for a review. Tr. 8-10. The ALJ's November 2006
25 decision became the Commissioner's final decision when the
26 Appeals Council denied review. 20 C.F.R. §§ 404.981, 422.210.

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STATEMENT OF THE FACTS

Plaintiff was 46 years old when she alleged disability in November 2002, and 50 years old when the ALJ issued his November 2006 decision. Tr. 70. The relevant period under review is from November 8, 2002 (alleged disability onset) to November 7, 2006 (date of ALJ's decision). Plaintiff has a general equivalency diploma and past relevant work as a sorter/pricer, forklift operator, warehouse worker, flagger, grinder operator, and child monitor (babysitter). Tr. 87, 536-37. The record indicates that plaintiff last worked full-time in 2002. Tr. 82, 507. During the period under review, plaintiff babysat her 3-year-old granddaughter for 16 hours per week. Tr. 504. Plaintiff alleged disability due to arthritis, degenerative disc disease, hepatitis, and chronic pain. Tr. 70, 81, 126.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to

1 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
2 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
3 an "inability to engage in any substantial gainful activity by
4 reason of any medically determinable physical or mental
5 impairment which can be expected . . . to last for a continuous
6 period of not less than 12 months. . . ." 42 U.S.C.
7 § 423(d)(1)(A).

8 The Secretary has established a five-step sequential
9 process for determining whether a person is disabled. Bowen v.
10 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
11 416.920. First the Secretary determines whether a claimant is
12 engaged in "substantial gainful activity." If so, the claimant
13 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
14 §§ 404.1520(b), 416.920(b).

15 In step two the Secretary determines whether the claimant
16 has a "medically severe impairment or combination of
17 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
18 §§ 404.1520(c), 416.920(c). If not, the claimant is not
19 disabled.

20 In step three the Secretary determines whether the
21 impairment meets or equals "one of a number of listed impairments
22 that the Secretary acknowledges are so severe as to preclude
23 substantial gainful activity." Id.; see 20 C.F.R.
24 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
25 presumed disabled; if not, the Secretary proceeds to step four.
26 Yuckert, 482 U.S. at 141.

27 In step four the Secretary determines whether the claimant
28 can still perform "past relevant work." 20 C.F.R.

1 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
2 disabled. If she cannot perform past relevant work, the burden
3 shifts to the Secretary. In step five, the Secretary must
4 establish that the claimant can perform other work. Yuckert, 482
5 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
6 (f). If the Secretary meets this burden and proves that the
7 claimant is able to perform other work which exists in the
8 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
9 416.966.

10 **DISCUSSION**

11 1. The ALJ's Findings

12 At step one, the ALJ found that plaintiff did not engage in
13 substantial gainful activity after her alleged disability onset
14 date. Tr. 22. At step two, plaintiff had the following severe
15 impairments: cervical, thoracic and lumbar degenerative disc
16 disease, and mild osteoarthritis of the knees. Id. At step
17 three, the ALJ found that plaintiff's impairments did not meet or
18 equal the requirements of a listed impairment. The ALJ found
19 that plaintiff's residual functional capacity indicated that she
20 could perform medium range work. Tr. 25. Plaintiff could not
21 crawl or climb ropes, ladders, or scaffolds. Id. Finally, at
22 step four, plaintiff was found not disabled because she could
23 perform her past relevant work as a flagger, sorter/pricer, or
24 grinder operator. Tr. 28.

25 2. Plaintiff's Allegations of Error

26 Among other allegations of error, plaintiff alleges that
27 the ALJ improperly evaluated the medical evidence in finding her
28 metal impairment non-severe at step two and non-disabling at step

1 three. I agree. Several doctors found that plaintiff had a
2 severe mental impairment. Dr. Bryan, an examining neuro-
3 psychologist, evaluated plaintiff regarding "factors that may
4 impede her independent functioning or ability to maintain
5 employment." Tr. 356. Dr. Bryan found no evidence of
6 "deliberate feigning or of malingering," and diagnosed plaintiff
7 with a pain disorder, depressive disorder, and alcohol dependence
8 in reported remission. Tr. 356-367. Dr. Bryan stated that
9 plaintiff did not have cognitive limitations, but had moderate-
10 to-marked social functioning limitations. Tr. 375-76.
11 Specifically, Dr. Bryan found that plaintiff was "marked" in her
12 restriction to "respond appropriately to work pressures in a
13 usual work setting," and moderately restricted in her ability to
14 interact appropriately with supervisors and co-workers, and to
15 respond appropriately to changes in a routine work setting. Tr.
16 376.

17 Next, Dr. Benakova, plaintiff's long-term treating
18 physician, found that plaintiff had a marked limitation in
19 activities of daily living and maintaining social functioning.
20 Tr. 444. Regarding plaintiff's episodes of decompensation, Dr.
21 Benakova found that plaintiff "has chronic problems that are
22 relatively stable making patient chronically decompensated." Id.
23 Dr. Benikova further explains that plaintiff is diagnosed with a
24 somatoform disorder and does not have "repeated episodes of
25 decompensation" because plaintiff is "chronically decompensated"
26 causing "moderate limitation of ability to do basic work
27 activities." Tr. 445.

28 Dr. Rullman, an internal medicine expert, testified at the

1 hearing that plaintiff's significant problem was chronic
2 depression and that she met the functional criteria of a mental
3 Listing, 12.04 (depressive). Tr. 532-34.

4 Finally, Dr. McDevitt, a psychiatrist, and expert called to
5 testify at the hearing after reviewing the records, stated that
6 plaintiff "probably has a major depressive disorder." Tr. 548.
7 Dr. McDevitt also stated that he agreed with Dr. Bryan's
8 diagnosis and finding that plaintiff "meets the diagnosis of pain
9 disorder associated with both psychological factors and a general
10 medical condition." Tr. 551. Dr. McDevitt, however, disagreed
11 that plaintiff's mental impairments met a Listing. Tr. 547-48.
12 Dr. McDevitt did agree that Dr. Benikova was in the best position
13 to evaluate plaintiff's functional restrictions from the
14 "combination of her conditions," including her physical and
15 mental impairments. Tr. 556.

16 Opinions from doctors with the most significant clinical
17 relationship with the plaintiff are generally entitled to more
18 weight than opinions from doctors with lesser relationships.
19 Carmickle v. Commissioner, 533 F.3d 1155, 1164 (9th Cir. 2008).
20 An ALJ must give clear and convincing reasons to reject a
21 treating or examining doctor's uncontradicted opinion and
22 specific and legitimate reasons to reject a contradicted opinion.
23 Id. In addition, "[t]he ALJ must do more than offer her own
24 conclusions. She must set forth her own interpretations and
25 explain why they, rather than the doctors', are correct."
26 Regennitter v. Commissioner, 166 F.3d 1294, 1299 (9th Cir.
27 1999) (internal quotation omitted). Here, all of the medical
28 experts agree that plaintiff is suffering from a Pain Disorder

1 and Major Depression. Both Dr. Bryan, the examining neuro-
2 psychologist, and plaintiff's long-time treating physician, Dr.
3 Benakova, found that plaintiff has significant functional
4 limitations as a result of those disorders, including moderate
5 and marked restrictions functioning in an employment setting.
6 Dr. McDevitt, an expert called to testify at the hearing after
7 reviewing records, testified that Dr. Benakova was in the best
8 position to offer an opinion regarding plaintiff's functional
9 limitations from her psychological and physical conditions. Tr.
10 551, 556. Dr. Benakova found plaintiff "chronically
11 decompensated" and diagnosed her with a somatoform disorder
12 equaling Listing 12.07. Finally, Dr. Rullman's opinion regarding
13 plaintiff's functional limitations was unclear, although he did
14 agree that she suffered from Major Depression and a Pain
15 Disorder.

16 I find that the ALJ failed to give appropriate reasons for
17 rejecting the diagnoses and opinions of Drs. Bryan and Benakova,
18 both doctors with significant clinical relationships with
19 plaintiff thereby entitling their opinions to more weight.
20 Therefore, their opinions should be credited as true. Benecke v.
21 Barnhart, 379 F.3d 587, 594 (9th Cir. 2004). Specifically, the
22 ALJ failed to identify any substantial medical evidence
23 contradicting those opinions. The ALJ improperly rejected Drs.
24 Bryan and Benakova's opinions, therefore those opinions will be
25 credited as a matter of law. Lester v. Chater, 81 F.3d 821, 834
26 (9th Cir. 1995). "The remaining question is whether to remand for
27 further administrative proceedings or simply for payment of
28 benefits. Where the Commissioner fails to provide adequate

1 reasons for rejecting the opinion of a treating or examining
2 physician, we credit that opinion "as a matter of law." Id.

3 **CONCLUSION**

4 The Commissioner's decision is not based on substantial
5 evidence. Therefore, this case is reversed and remanded for
6 payment of benefits. This case is dismissed.

7 IT IS SO ORDERED.

8 Dated this 3 day of December 2008.

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12 /s/ Ann Aiken

13 Ann Aiken
14 United States District Judge
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